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83-803

No. _____

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1983

MARTHA FRANKLIN SCHULTZ,
Petitioner

vs.

STATE OF ALABAMA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

WILLIAM J. BAXLEY
CHARLES A. DAUPHIN
Suite 304
2100 16th Avenue South
Birmingham, Alabama 35205

Attorneys for Petitioner,
MARTHA FRANKLIN SCHULTZ

QUESTION PRESENTED

WHETHER A SLOW MOVING CAR IN A PRIVATE FIELD AT NIGHT PROVIDES A SUFFICIENT BASIS FOR AN INVESTIGATORY STOP WHEN:

1. NO SPECIFIC CRIME HAD BEEN REPORTED IN THE AREA.

2. NO WRONGDOING ON THE PART OF PETITIONER, OTHER THAN BEING ON PRIVATE PROPERTY, WAS SUSPECTED.

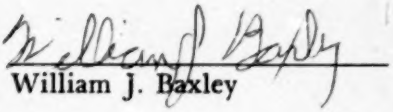
3. PETITIONER WAS NOT IN AN AREA OF HIGH CRIME.

4. PETITIONER WAS ON PRIVATE LAND.

CERTIFICATE OF INTERESTED PARTIES

The undersigned, counsel of record, certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualifications or recusal.

Martha Franklin Schultz — Petitioner
State of Alabama — Respondent
William J. Baxley; Baxley, Beck, Dillard & Dauphin — Attorney for Petitioner
Charles A. Dauphin; Baxley, Beck, Dillard & Dauphin — Attorney for Petitioner
William A. North; Assistant Attorney General for the State of Alabama — Attorney for Respondent
Charles A. Graddick; Attorney General for the State of Alabama — Attorney for Respondent



William J. Baxley

TABLE OF CONTENTS

	Page
Question Presented	i
Certificate of Interested Parties	ii
Table of Contents	iii
Table of Authorities	iii
Citation to Opinions Below	iv
Jurisdictional Statement	1
Constitutional and Statutory Provisions	1
Statement of the Case	2
Reasons for Granting the Writ	4
Statement of Service	10
Appendix A	A-1
Appendix B	B-1

TABLE OF AUTHORITIES

Cases	*Page*
Brown v. State of Texas, 443 U.S. 47 (1979)	5, 8, 9
Delaware v. Prouse, 440 U.S. 648 (1979)	6
Terry v. State of Ohio, 392 U.S. 1 (1968)	4, 8
United States v. Brignoni-Ponce, 422 U.S. 873 (1975)	8, 9
United States v. Cortez, 499 U.S. 411 (1981)	4, 7, 8
United States v. Stricklin, 534 F.2d 1386 (10th Cir.), cert. denied, 429 U.S. 831 (1976)	7

CITATION TO OPINIONS BELOW

The Alabama Court of Criminal Appeals entered an order and opinion on October 12, 1982, reversing the trial court. 2 Div. 325. See Appendix A.

On May 31, 1983, the Alabama Court of Criminal Appeals granted a rehearing, and withdrew its initial opinion. 2 Div. 325. See Appendix B.

On September 2, 1983, the Supreme Court of the State of Alabama denied review.

No. .....

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1983

MARTHA FRANKLIN SCHULTZ,
Petitioner

vs.

STATE OF ALABAMA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

JURISDICTIONAL STATEMENT

The Alabama Court of Criminal Appeals entered its opinion on rehearing on May 31, 1983. The Alabama Supreme Court denied review on September 2, 1983. This Petition was filed within sixty (60) days of September 2, 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution.

STATEMENT OF THE CASE

In November, 1980, two Deputy Sheriffs with the Dallas County Sheriff's Department were on routine patrol in Dallas County, Alabama. At approximately 10:30 p.m. on Old County Road No. 2, the officers observed a vehicle in an open cotton field approximately 300 yards from the County Road moving very slowly. When the vehicle was first seen, the officers only saw the headlights and were unable to tell whether the vehicle was a car or truck.

The officers turned their lights off, and drove into the cotton field. The officers did not follow Petitioner's vehicle but came up behind it and, about 20 yards from Petitioner's vehicle, turned on their blue light.

The officers did not hear any guns go off or hear any dogs barking. They did not see any search lights out from Petitioner's vehicle.

The Sheriff's Department had received a lot of complaints of night hunting around that area, but the officers did not know if people were night hunting or what. They suspected the people in Petitioner's vehicle might be night hunters when they first spotted the vehicle. However, when the officers stopped Petitioner's vehicle they had not observed anyone commit any offense. The officers' only complaint was that the Petitioner's vehicle was in a "private field" at night. The officers had not received any complaints, and did not charge the Petitioner with trespassing.

One of the officers knew the person who rented the land but did not know whether Petitioner had permission to be on the property. Petitioner's father was the owner of the land and had given Petitioner permission to be there.

Upon stopping Petitioner's vehicle, one of the officers asked Petitioner for her driver's license. Petitioner got out of her car and walked to the trunk where her driver's li-

cense was in her purse. The driver's door was left open and one of the officers witnessed, among other things, an envelope containing marijuana.

On May 12, 1981, Petitioner was arraigned and pled not guilty to charges of possession of controlled substances in violation of Section 20-2-70, *Code of Alabama*, 1975. Petitioner filed a Motion to Suppress evidence based upon there being no reasonable basis for the investigatory stop which eventually led to the discovery of the controlled substances. The trial court held a pretrial hearing on the Motion to Suppress wherein the Deputy Sheriffs who made the stop and arrest gave the testimony outlined above.

On October 5, 1981, Petitioner was found guilty and the jury set her fine at $10,000.00. On January 7, 1982, the trial judge sentenced her to fifteen (15) years in the state penitentiary. Petitioner filed a Motion for New Trial on February 1, 1982, which was overruled on February 23, 1982. Oral Notice of Appeal was given at the Sentencing Hearing.

On October 12, 1982, the Court of Criminal Appeals rendered an opinion reversing the trial court's denial of the Motion to Suppress holding the investigatory stop was unconstitutional under the Fourth Amendment.

Respondent then filed an Application for Rehearing. On May 31, 1983, the Alabama Court of Criminal Appeals granted the rehearing and entered an opinion withdrawing its initial opinion based upon the Sheriff's Department, not the officers making the arrest, receipt of general complaints of night hunting in the area of the cotton field where Petitioner was arrested.

On June 14, 1983, Petitioner filed her Application for Rehearing which was denied on July 5, 1983. On July 19, 1983, Petitioner filed a Petition for Writ of Certiorari with the Alabama Supreme Court which was subsequently de-

nied without opinion. Petitioner then filed a Stay of Mandate with the Alabama Court of Criminal Appeals which was granted on September 2, 1983.

REASONS FOR GRANTING THE WRIT

The Fourth Amendment applies to all seizures of the person, including brief stops for investigatory purposes. Such investigatory stops must be based on "some objective manifestation that the person is, or is about to be, engaged in criminal activity." *United States v. Cortez,* 449 U.S. 411 (1981). An initial analysis of the application of the Fourth Amendment to investigatory stops was set forth by this Court in *Terry v. State of Ohio,* 392 U.S. 1 (1968). In *Terry,* the Court recognized circumstances which would justify an officer detaining a person when the officer lacked the "probable cause" to make an arrest. The Court, however, exercised caution in allowing such an intrusion on a person's Fourth Amendment rights and opined that ". . . in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Id.

Whether couched in terms of "specific and articulable facts" or "some objective manifestation", this Court requires an officer have some reasonable basis derived from the conduct of the suspect before an investigatory stop can be made.

In the case at hand, the conduct of the Petitioner did not give the officers any "specific and articulate facts", or "objective manifestation" that Petitioner was about to commit a serious crime.

In the present case, the Petitioner was driving in a private cotton field owned by her father. The officers noticed the lights of her vehicle 300 yards from a public road. At

that time, they thought Petitioner may have been a night hunter. Yet, when the officers turned into the cotton field, they heard no dogs barking, saw no search lights, and noticed no change in direction.

Furthermore, one of the officers testified, "we didn't know if people were hunting or what". The Sheriff's Department had simply received general complaints of night hunting in that general area.

More importantly, the officers stopped Petitioners only because they were in a private field at night. After the officers turned into the cotton field, after they turned off their headlights, after they saw Petitioner's vehicle was not a truck but a car, they know the Petitioner was not night hunting. The officers proceeded with the investigatory stop because the cotton field was a private field and the officers thought Petitioner was trespassing.

The Alabama Court of Criminal Appeals ignored the true reason for the investigatory stop and reasoned that the officers had sufficient cause to stop Petitioner's vehicle due to reports of night hunting in that general area. This rationale is erroneous. In *Brown v. State of Texas,* 443 U.S. 47 (1979) the Defendant had been stopped by an officer for no other reason than he "looked suspicious and we had never seen that subject in the area before", and the suspect was in an area of high crime. The Court held the mere presence of a person in an area of frequent criminal activity was not a sufficient reason for an investigatory stop. In the instant case, Petitioner was not even in a high crime area but was only in an area where night hunting had been reported generally.

Moreover, in its initial opinion (see Appendix A) the Alabama Court of Criminal Appeals noted that the officer, prior to stopping Petitioner's vehicle, had not seen the vehicle violating any law and had not heard of any recent

complaints of trespassing in the area. As evidenced by this Court's opinion in *State of Delaware v. Prouse,* 440 U.S. 648 (1979), the officer based his investigatory stop of the Petitioner on insufficient criteria.

In *Prouse,* a patrolman stopped the defendant's automobile and seized a quantity of marijuana in "plain view". The patrolman testified that his reasons for stopping the defendant's car were simply for a driver's license and registration check. The patrolman had not noticed any traffic violations, equipment violations, or any other suspicious activity on the part of the defendant. This Court held:

> Many people spend more hours each day traveling in cars than walking on the streets, undoubtedly, many find a greater sense of security and privacy in travelling in an automobile than they do in exposing themselves by pedestrian or other modes of travel . . . Accordingly, we hold that except in those situations in which there is at least articulable and reasonable suspicion that motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile is unreasonable under the Fourth Amendment.
>
> — 440 U.S., at 663.

In this case, the officers were on routine patrol and noticed Petitioner's vehicle, not on a public street, but in a private field. There was not suspicion that Petitioner was unlicensed or that the automobile was not registered. Nor, at the time of the stop, was there a reasonable suspicion that Petitioner had violated any law. The stop violated Petitioner's Fourth Amendment rights to be free from unreasonable searches and seizures.

Additionally, the Alabama Court of Criminal Appeals' opinion on rehearing relied on *United States v. Stricklin,* 534 F.2d 1386 (10th Cir.), cert. denied, 429 U.S. 831 (1976). In *Stricklin,* the officers were patrolling a public recreation area specifically looking for illegal nighttime hunting. The officers first noticed a "flashing" light and proceeded to investigate the light source. The officers observed two vehicles passing back and forth on the road. The vehicles seemed to be "sweeping their headlights and thereby illuminating the area to either side of the road." Two-and-a-half hours after the defendants were initially spotted, the officers made an investigatory stop.

Contra to the facts in *Stricklin,* the Petitioner in the instant case was on private property in a 1979 Grand Prix, was not using a spot light or "sweeping" her headlights, was not changing direction, but was moving at a slow speed. The Petitioner showed no objective manifestation that she was night. (Who goes night hunting in a 1979 Grand Prix in the middle of a cotton field?)

Finally, a distinction must be made between the time an officer becomes suspicious and the time he makes an investigatory stop. Once an officer becomes suspicious he must investigate and notice "some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." *U. S. v. Cortez,* 499 U.S. 411 (1981).

In this case, the officers thought "to start with" Petitioner may have been night hunting. At the time they made the stop, however, they only thought the Petitioner was on private property. Their investigation, if any, dispelled any suspicions that Petitioner was night hunting.

Opinions from this Court have exhibited a distinction between officers making stops on hastily made "hunches" and making stops on objective reasons.

In *Terry v. Ohio,* 392 U.S. 1 (1967), the officer observed the suspect walking back and forth in front of the same store window twenty-four times and noted that each trip was followed with a conference between the two suspects. The officer then followed the two suspects until they met a third. Only then, did the officer make an investigatory stop.

In *U. S. v. Cortez,* 449 U.S. 411 (1981), the border patrol had done an extensive investigation and on the night in question noticed the suspect truck pass by, but waited until the same truck returned before they made an investigatory stop. In *Terry* and *Cortez,* the United States Supreme Court held the investigatory stops to be legal.

By comparison, the United States Supreme Court held the investigatory stops made in *Brown v. Texas,* 443 U.S. 47 (1979), and *U. S. v. Brignoni-Ponce,* 440 U.S. 648 (1979) to be illegal. In *Brown,* the defendant was stopped because he was walking out of an alley frequented by drug users away from another person. The officers did not investigate but immediately stopped the suspect. In *Brignoni-Ponce,* the border patrol stopped an automobile because the occupants were of Mexican descent and were in the vicinity of the border where aliens were known to cross. Again, the border patrol did not make any prolonged observations or investigations but immediately stopped the automobile.

In the instant case, the Deputy Sheriffs noticed Petitioner's vehicle in a private field at night. Even though there had been complaints of night hunting, the Deputy Sheriffs did not know if people were night hunting or what. Finally, at the time of the stop, they had no complaint other than the car being in a private field.

Just as the officials in *Brown* and *Brignoni-Ponce* initially observed suspects in a high-crime area but observed no particular suspicious activity, so did the Deputy Sheriffs of

Dallas County. Just as the officials in *Brown* and *Brignoni-Ponce* made illegal investigatory stops, so did the Deputy Sheriffs of Dallas County.

CONCLUSION

In conclusion, the officers had no reasonable basis for making the investigatory stop. The premise that they suspected the Petitioner for night hunting is fallacious. At the time of the stop, they only suspected the Petitioner of trespassing. Petitioner's conduct at no time exhibited suspicious activity.

Petitioner respectfully requests this Court to grant her Petition for Writ of Certiorari, and upon further consideration, to reverse the final decision of the Alabama Court of Criminal Appeals.

STATEMENT OF SERVICE

I hereby certify and affirm that on this the 28 day of ~~November~~ October, 1983, copies of the foregoing Petition were mailed, with first class postage prepaid and properly addressed, to the following:

Honorable William A. North
Assistant Attorney General
Office of the Attorney General
250 Administrative Building
Montgomery, Alabama 36130

and

Honorable Charles A. Graddick
Attorney General for the State of Alabama
250 Administrative Building
Montgomery, Alabama 36130

William J. Baxley
William J. Baxley

Sworn to and subscribed before me on this the 28 day of ~~November~~ October, 1983.

Teresa Chester (Her)
Notary Public

APPENDIX

THE STATE OF ALABAMA – JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS
OCTOBER TERM, 1982-83

2 Div. 325

Martha Franklin Schultz
v.
State

Appeal from Dallas Circuit Court

BOWEN, JUDGE

The defendant was indicted and convicted for the unlawful possession of marijuana in violation of Alabama Code Section 20-2-70 (1975). The jury set her fine at $10,000 and the trial judge sentenced her to fifteen years in the penitentiary. Because the evidence introduced at trial was the product of an illegal seizure, we reverse.

About 10:30 p.m. on November 21, 1980, Dallas County Sheriff's deputies Wayne Odom and Dale Maddox were on routine patrol of County Road 2 near Old Cahaba when they observed a vehicle three or four hundred yards off the main road. The vehicle had its headlights on and was moving slowly down a dirt road separating two cotton fields.

Deputy Odom switched off his headlights, headed the patrol car down the dirt road, and followed the vehicle. When the deputy turned on the patrol car's blue lights, the car in front stopped. Deputy Odom approached the vehicle and asked the defendant, who was driving, for her driver's license.

As Deputy Odom asked the person on the passenger side of the car for some identification, he observed a manila

folder, filled with what appeared to be marijuana, on the car seat. Odom also saw a fruitcake tin on the passenger side floorboard and, after opening it, he arrested the passenger for possession of marijuana.

Deputy Odom then ascertained from the defendant that she was the owner of the vehicle and he placed her under arrest for the same offense. He later obtained a warrant to search the entire car and he found more marijuana in the trunk.

On cross-examination, Deputy Odom acknowledged that, prior to stopping the defendant's vehicle, he had not seen it violating any law, and he had not heard any recent complaints of trespassing in the area. The deputy conceded that he stopped the automobile only for "being out in the field on private property at that time of night." Evidence for the defendant established that the cotton fields were leased by her father, who had given her permission to be there.

The Fourth Amendment applies to all "seizures" of the person, *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975), including brief encounters short of full-scale arrests, see *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). But see *United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980). Stopping a vehicle and detaining its occupants, even if the purpose is merely to request identification, constitutes a seizure. *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979). See also *Brown v. Texas*, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979).

Although the *Mendenhall* decision has cast doubt upon whether non-physical encounters between police and pedestrians amount to "seizures," that case reaffirms the concept

that vehicle stops still fall clearly within the Fourth Amendment proscriptions.

> "[S]topping or diverting an automobile in transit, with the attendant opportunity for a visual inspection of areas of the passenger compartment not otherwise observable, is materially more intrusive than a question put to a passing pedestrian, and . . . the former . . . amounts to a seizure . . ."

100 S.Ct. at 1878.

Like all other Fourth Amendment inquiries, the ultimate question here is whether, under the circumstances, the investigatory detention was reasonable, since the Constitution forbids only "unreasonable searches and seizures." U.S. Const. amend IV; *Brown v. Texas,* supra; *Terry v. Ohio,* supra. In *Terry,* the Supreme Court observed that there is " 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.' " 392 U.S. at 21, 88 S.Ct. at 1879, 20 L.Ed.2d at 905 (quoting *Camara v. Municipal Court,* 387 U.S. 523, 534-35, 87 S.Ct. 1727, 1735, 18 L.Ed.2d 930, 938-40 (1967); bracketed material added by the *Terry* Court).

Although investigative stops may be used on circumstances falling short of probable cause to arrest, *Terry v. Ohio,* supra, they must be justified by "some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity," *United States v. Cortez,* 449 U.S. 411, 417, 101 S.Ct. 690, 695, 66 L.Ed.2d 621, 628 (1981). "Inarticulate hunches" are not sufficient. See *Terry v. Ohio,* 392 U.S. at 22, 88 S.Ct. at 1880, 20 L.Ed.2d at 906.

The United States Supreme Court recognized the imprecision of any test used to determine whether the stop is constitutionally permissible in *Cortez,* supra:

> "Courts have used a variety of terms to capture the elusive concept of what cause is sufficient to authorize police to stop a person. Terms like 'articulable reasons' and 'founded suspicion' are not self-defining. They fall short of providing clear guidance dispositive of the myriad factual situations that arise. But the essence of all that has been written is that the totality of the circumstances — the whole picture — must be taken into account. Based upon that whole picture the detaining officers must have a *particularized and objective basis for suspecting the person stopped of criminal activity.*"

449 U.S. at 417, 101 S.Ct. at 695, 66 L.Ed.2d at 628-29 (emphasis added).

An objective basis for suspicion exists when the defendant's *conduct,* combined with the particular *time* of day or the *location* of his activities, triggers the officer's educated guess that something is amiss. See generally W. LaFave, 3 *Search and Seizure* § 9.3 at 78-79 (1978). Although both time of day and location are relevant factors, neither, standing alone, furnishes the basis for a permissible stop. *Id.*

The border area patrol and airport cases, for example, establish that, while illegal aliens and drug couriers are prone to surface at certain locations, the nature of the place and the people who frequent it do not authorize detention of subjects there unless the officers have identifiable reasons to suspect particular individuals in the area. Compare, *United States v. Brignoni-Ponce,* supra (mere fact that occupants of automobile appeared to be of Mexican descent did not justify detention of vehicle near border area) with *United States v. Cortez,* supra (extensive four-month "tracking" investigation based on shoe prints of alien transporter, weather conditions, and probable type of vehicle and time used authorized stop of car believed to be carrying illegal aliens). See *United States v. Mendenhall,* 446

U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980) (seven members of the court assuming suspect was "seized" because she fit "drug courier profile").

Similarly, even an investigatory stop of an individual in a high-crime metropolitan area is not warranted unless the suspect displays some unusual conduct or the officer is acting on additional information, such as a tip or a report of recent crime. Compare *Brown v. Texas*, supra (high drug-traffic area but no specific misconduct by defendant rendered detention unreasonable) with *Adams v. Williams*, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972) (high crime area plus informant's tip that suspect was armed and in possession of narcotics justified stop). See *Kimbrough v. State*, 352 So. 2d 512 (Ala.Cr.App.), cert. denied, 352 So. 2d 516 (Ala. 1977) (stop of suspect, in warm weather, who was wearing heavy coat bulky enough to conceal stolen auto parts, and who averted his gaze when he saw officer in area with high incidence of auto parts thefts).

Based on the same reasoning, otherwise innocuous conduct does not become suspicious simply because it occurs at an unusual hour. W. LaFave, 3 *Search and Seizure* at 72-73.

> "Although conduct which might be deemed innocent in the daytime might be viewed otherwise at night, even at night something in the way of suspicious conduct should be present, such as stealthy movements, efforts to conceal one's presence from passersby, flight from the premises or other conduct which would not ordinarily be expected from a person who resides there."

Id. See *Minnifield v. State*, 390 So. 2d 1146 (Ala.Cr.App.), cert. denied, 390 So. 2d 1154 (Ala. 1980) (suspect who attempted to conceal his vehicle apprehended at 3:00 a.m. near recently-burglarized furniture store); *Butler v. State*,

380 So. 2d 381 (Ala.Cr.App. 1980) (after officer received tip that someone had run around service station at 2:00 a.m. and left his car in a "dangerous position," officer stopped suspect who reacted nervously at sight of sheriff's car and whose vehicle matched earlier description); *Luker v. State*, 358 So. 2d 504 (Ala.Cr.App. 1978) (stranger in neighborhood where recent burglaries had occurred stopped by officers after he jumped into bushes and threw object on the ground upon seeing police); *Racine v. State*, 51 Ala. App. 484, 286 So. 2d 890, cert. denied, 291 Ala. 684, 286 So. 2d 896 (1973) (unknown suspect in old car with loud muffler stopped at 11:30 p.m. in quiet, upper-class residential neighborhood, which had been the scene of recent criminal activity and whose residents were "thoroughly familiar" to the officer); *Rutherford v. State*, 48 Ala. App. 289, 264 So. 2d 210, cert. denied, 288 Ala. 750, 264 So. 2d 214 (1972) (stop of vehicle at midnight near remote cabin which had been recently burglarized). See also *United States v. Holland*, 510 F. 2d 453 (9th Cir.), cert. denied, 422 U.S. 1010, 95 S. Ct. 2634, 45 L. Ed. 2d 674 (1975) (suspect believed to be armed fugitive stopped at 1:00 a.m. on rural dirt road near house with illegal drug factory).

Most of the Alabama cases have dealt with the detention of suspects who matched the description of dangerous individuals, or with the stops of cars which corresponded to the appearance or location of vehicles used in recent or suspected offenses. See, e.g., *Oliver v. State*, 385 So. 2d 69 (Ala. Cr. App. 1980) (stop and pat down in response to warning that suspect was armed and ready to shoot); *Wheat v. State*, 372 So. 2d 400 (Ala. Cr. App. 1979) (detention of previously described individual in lounge, with red auto parked outside, following report of musical instruments taken by suspects driving red car); *Bagony v. City of Birmingham*, 371 So. 2d 80 (Ala. Cr. App. 1979) (stop and

frisk of suspect in restaurant following report that he had threatened woman with his gun); *Andrews v. State*, 406 So. 2d 1041 (Ala. Cr. App.), cert. denied, 406 So. 2d 1045 (Ala. 1981) (car used in robbery); *Johnson v. State*, 406 So. 2d 446 (Ala. Cr. App. 1981) (same); *Thatch v. State*, 397 So. 2d 246 (Ala. Cr. App.), cert. denied, 397 So. 2d 253 (Ala. 1981) (same); *Goodman v. State*, 356 So. 2d 691 (Ala. Cr. App.), cert. denied, 356 So. 2d 698 (Ala. 1978) (same); *Campbell v. State*, 354 So. 2d 325 (Ala. Cr. App. 1977) (vehicle used in kidnapping); *Fennell v. State*, 51 Ala. App. 23, 282 So. 2d 373, cert. denied, 291 Ala. 778, 282 So. 2d 379 (1973) (tip from law enforcement officer that Oldsmobile with Kentucky license tag was transporting illegal liquor).

In the case before us, we have neither a high crime area nor a place of recently-reported crime. The deputy who stopped the defendant was not acting on information derived from any source other than his own observations, and he did not point to any specific misconduct on the defendant's part other than "being out in the field on private property at that time of night."

Prior to being stopped, the defendant had not exhibited any stealthy or evasive action and her vehicle did not appear to be in violation of any ordinance. The fact that she was driving on a dirt road between two cotton fields at 10:30 p.m. may have given rise to an "inarticulate hunch" that she was up to no good, see *Terry v. Ohio*, 392 U.S. at 22, 88 S. Ct. at 1880, 20 L. Ed. 2d at 906, but it did not support a specific, "particularized," or "objective" suspicion that she should be detained. See *United States v. Cortez*, 449 U.S. at 417, 101 S. Ct. at 695, 66 L. Ed. 2d at 628-29.

We believe, as the United States Supreme Court stated in *Brown v. Texas*, that "[i]n the absence of any basis for suspecting appellant of misconduct, the balance between

the public interest and appellant's right to personal security and privacy tilts in favor of freedom from police interference." 443 U.S. at 52, 99 S. Ct. at 2641, 61 L. Ed. 2d at 363.

REVERSED AND REMANDED.

All Judges Concur.

THE STATE OF ALABAMA – JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS
OCTOBER TERM, 1982-83

2 Div. 325

Martha Franklin Schultz
v
State

Appeal from Dallas Circuit Court

ON REHEARING

BOWEN, PRESIDING JUDGE

This Court originally reversed defendant's conviction for possession of marijuana, finding that the evidence introduced at trial was the product of an illegal seizure. We held that Dallas County Sheriff's deputies Wayne Odom and Dale Maddox did not have adequate grounds for an investigatory stop of defendant's vehicle based solely on their testimony of having seen the headlights of a car moving slowly down a dirt road separating two cotton fields at 10:30 p.m. Since the initial stopping of the vehicle was unreasonable, the officers had no authority to seize a manila folder, filled with what appeared to be marijuana, in plain view on the car seat.

I

On application for rehearing, the Attorney General filed a motion to supplement the record to incorporate a transcript of defendant's preliminary hearing, which was not included in the record on appeal submitted to this Court. That motion is due to be granted because the record clearly

shows that the trial judge considered the preliminary hearing transcript in making his determination of probable cause. At trial, defense counsel told the court that he was "willing to submit these motions (to suppress) to you (trial judge) on the transcript already prepared and let you decide on that basis." The trial judge stated that he would "consider the transcript of the testimony taken at the preliminary hearing . . . for purposes of this suppression motion." The transcript was then marked "for identification."

We have granted the application for rehearing and have withdrawn our original opinion because the additional evidence adduced at the preliminary hearing provides "specific and articulable facts" upon which to base a reasonable suspicion that the occupants of defendant's vehicle had committed or were about to commit an offense. See *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

At the preliminary hearing, Deputy Odom testified as follows:

> "A. We had a lot of complaints about night hunting around that area. We didn't know if people were night hunting or what.
>
> "Q. Did you suspect that they might be night hunters?
>
> "A. Exactly what we thought to start with.
>
> "Q. That's exactly what you thought to start with?
>
> "A. Yes."

Odom also testified that the vehicle "was moving awfully slow. I mean it wouldn't even register on the speedometer, it was that slow."

In our judgment, the complaints of night hunting in the area, combined with the deputies' observation of the car moving slowly through the fields with its headlights on, gave rise to more than an "inarticulate hunch" that some-

thing was amiss, see *Terry v. Ohio*, 392 U.S. at 22, and established an "objective basis for suspecting" (the defendant) of criminal activity", see *United States v. Cortez*, 449 U.S. 411, 417 (1981), i.e., of hunting at night. See also *Langley v. State*, 383 So.2d 868, 869 (Ala.Crim.App.), cert. denied, 383 So.2d 873 (Ala. 1980).

At least three Alabama statutes specifically prohibit hunting at night. See Alabama Code Sections 9-11-235; -242; -251 (1975). A violation of any of these sections constitutes a misdemeanor. Section 9-11-252. Hunting any protected game, except deer, at night can result in a fine of $250 to $500 and possible revocation of a hunting license for one year. Alabama Code Sections 9-11-235; -242. The penalty for hunting deer at night is a minimum $500 fine, mandatory revocation of hunting license, and imprisonment for up to ten days in the county jail. Alabama Code Section 9-11-252.

County sheriffs are, by statute, authorized to enforce the game and fish laws, specifically those provisions proscribing night hunting, and to seize any vehicle or hunting equipment used in such illegal activity. Alabama Code Section 9-11-252.1 (b) (1975). In addition, statutory authority for the type of investigatory detention approved in *Terry v. Ohio*, supra, is found in Section 15-5-30, Code of Alabama 1975.

> "A sheriff or other officer acting as sheriff, his deputy or any constable, acting within their respective counties, . . . may stop any person abroad in a public place whom he reasonably suspects is committing, has committed or is about to commit a felony or other public offense and may demand of him his name, address and an explanation of his actions."

Although the defendant's vehicle was in an open cotton field on private property three or four hundred yards from

the highway, its headlights and its movement (the very things which, in connection with the night hunting complaints, made it suspicious) were clearly visible from the public roadway from which it was sighted by the deputies. Under these circumstances, the vehicle was in a public place within the meaning of Section 15-5-30. Compare *Warren v. City of Auburn*, 337 So.2d 1319 (Ala. 1976) (the defendant drinking beer in yard of his apartment house was in a "public place", for purposes of public intoxication ordinance, because he and his beer can could be observed from a public street); *Lee v. State*, 136 Ala. 31, 33 So. 894 (1903) (dice players forty yards from highway were in a "public place", within the meaning of gaming statute, because their activities were visible to persons traveling the highway); and *Henderson v. State*, 59 Ala. 89 (1877) (gamblers in bushes on edge of field forty yards from road were in a "public place" because they were in view of a path used by schoolchildren); with *Smith v. State*, 23 Ala. 39 (1853) (hollow located 100-115 yards from main road and *not* visible from highway was *not* a "public place"); *Taylor v. State*, 22 Ala. 15 (1853) (field surrounded by forest one mile from highway *not* a "public place" because not visible from public roadway); and *Bythwood v. State*, 20 Ala. 47 (1852) (hollow in the woods 400 yards from highway and out of sight *not* a "public place").

There can be no serious question that a misdemeanor such as a game and fish law violation is a "public offense" within the meaning of Section 15-5-30. Section 1-1-5, Code of Alabama 1975, defined a "public offense" as "an act or omission forbidden by law and punishable as provided in this Code." Although that section was repealed by the new Criminal Code, 1977 Ala. Acts 812, No. 607, Section 9901 (January 1, 1980), misdemeanors have routinely been classified as "public offenses" in Alabama and other juris-

dictions. See *Starnes v. State,* 30 Ala.App. 156, 2 So.2d 233 (1941); *People v. Tuck,* 142 Cal.Rptr. 362, 75 Cal.App.3d 639, 644 (1977); *Smith v. Hubbard,* 253 Minn. 215, 91 N.W.2d 756, 761 (1958).

In addition, although the question has not been addressed in Alabama, other jurisdictions have applied the same Fourth Amendment standards generally applicable to automobile searches to searches of vehicles involved in suspected game law violations. See *United States v. Stricklin,* 534 F.2d 1386 (10th Cir.), cert. denied, 429 U.S. 831 (1976); *State v. Pearce,* 318 So.2d 455 (Fla.Dist.Ct.App. 1975); *State v. Brumley,* 95 Idaho 919, 523 P.2d 522 (1974); *State v. Hillock,* 384 A.2d 437 (Me. 1978); *Daugherty v. State,* 40 Md.App. 35, 392 A.2d 1165 (Ct.Spec.App. 1978); *State v. Dickenson,* 43 Or.App. 1023, 607 P.2d 754 (Ct.App. 1979); *State v. Odam,* 40 Or.App. 551, 595 P.2d 1277 (Ct.App. 1979), affirmed, 290 Or. 160, 619 P.2d 647 (1980); *Gonzalez v. State,* 588 S.W.2d 355 (Tex.Crim.App. 1979).

In *United States v. Stricklin,* supra, a game and fish officer patrolling a thinly-populated ranch and recreation area at night saw a light on the horizon and later observed automobile headlights illuminating roadside areas. The Tenth Circuit Court of Appeals approved the detention of the vehicle on suspicion of night hunting and upheld the subsequent search which uncovered marijuana.

In *State v. Hillock,* supra, a game warden observed the defendant's vehicle being driven on a little-used road at night in an area where deer were known to abound at a time when officers had heard complaints of night hunting in the area. The Supreme Court of Maine upheld the stop of the vehicle based on a *Terry v. Ohio* type state statute and observed the following:

> "At the time appellants were stopped, Warden Ford had knowledge and could have articulated if he had been asked, that the area was one in which a crime was being committed by someone, i.e. night-hunting, and that the road was one little used for legitimate purposes after dark. As a result of this perfectly proper investigative stop, he observed the light and the gun *in plain view*." 384 A.2d at 441. (Emphasis in original).

In our judgment, therefore, the deputies here had "specific and articulable facts", *Terry v. Ohio*, supra, upon which to base their suspicions of night hunting. The vehicle stop was justified and the subsequent finding of marijuana was incident to the plain-view exception to the warrant requirement. See *Daniels v. State*, 290 Ala. 316, 276 So.2d 441 (1973).

II

The defendant contends that the court erred by denying her motion to produce a sample of the marijuana for independent testing and analysis.

However, the record reveals that the court ordered a sample of the material "to be delivered to a testing facility of defendant's choice", and directed her attorney to provide the court with the name of a laboratory. The court stated for the record that the defendant's attorney had not been denied inspection of the evidence but was "free to look at it any time . . . wherever it was."

The record only supports a finding that the defendant did not avail herself of the opportunity to have the material tested. She cannot now be heard to complain that her rights have been violated. See *Etheridge v. State*, 414 So.2d 157 (Ala.Crim.App. 1982).

III

The rule against joinder of felonies and misdemeanors in the same count of an indictment does not apply to an indictment under Section 20-2-70, Code of Alabama 1975, since the charged felony includes a misdemeanor by operation of law. *Coleman v. State*, 344 So.2d 1249, 1250 (Ala.Crim. App. 1977).

IV

The defendant argues that the failure of any prospective juror to respond to the following voir dire question requires that the whole venire should have been stricken: "Would any of you acquit the defendant if the state failed to prove her guilty beyond a reasonable doubt?"

The trial court denied the defendant's motion to strike the venire, but immediately inquired of the prospective jurors:

> "Do any of you have any doubt or any reservation that in serving as a juror that you would be able to follow the instructions that the Court would give you as to the law and the law as it applies in this case? Is there anyone of you that think you might have any problem with that whatsoever?
>
> "(No response)."

The court's charge on the State's burden of proof, the presumption of defendant's innocence, and the standard of reasonable doubt was detailed and comprehensive, and the defendant took no exception to it. Under these circumstances, overruling the motion to strike the venire was not harmful to defendant. A.R.A.P. 45.

V

At a bench conference prior to the introduction of evidence found in the defendant's vehicle, the court cautioned

the State to refrain from mentioning " (t) he bottle containing unknown crystal substance, the white powder, this white powder substance, white residue and a green suede coat and a clear bottle containing a blue crystal substance." The court stated that " (n) one of those things would have anything to do with the charge in this case." Thereupon, the State elicited the following testimony from Deputy Wayne Odom:

> "Q. Deputy Odom, what did you find in the trunk, please, sir?
> "A. Several items were found. Some marijuana and scales. Plastic bags. A small piece of paper with handwritten weights and grams and ounces wrote on it."
> . . . .
> "Q. And where was that metal can found, please, sir?
> "A. Between Mr. Wilson's legs on the passenger side of the vehicle."
> . . . .
> "Q. And what is contained inside that can, please, sir, that fruit cake can?
> "A. There's a razor blade, a straight razor blade, some rolling papers."

Counsel for defendant objected and moved for a mistrial on the grounds that the foregoing testimony introduced evidence of separate crimes, and was in violation of the trial court's admonition not to elicit evidence pertaining to other drug charges. The trial court denied the motion for mistrial, but instructed the jury to exclude the testimony from its consideration and polled each juror individually to determine whether he could disregard it.

In our judgment, the testimony was admissible on the issue of possession of marijuana even though it may have pointed to other drug offenses. See *Brantley v. State*, 294 Ala. 344, 317 So.2d 345 (1975); *Durden v. State*, 394 So.2d

967 (Ala.Crim.App. 1980), cert. quashed, 394 So.2d 977 (Ala. 1981). Moreover, any error was cured by the action of the trial court.

VI

The defendant insists that her motion for new trial should have been granted because the record does not show that her given written charges were taken to the jury room.

Section 12-16-13, Code of Alabama 1975, requires that "(c) harges which are marked 'given' by the trial judge *must* be taken by the jury with them on retirement. . . ." (Emphasis added).[1] Here, the record reveals that immediately before the jury retired, the trial judge stated the following: "Okay, ladies and gentlemen, if you take these verdict forms and the exhibits the bailiff will carry you back to the jury room and you can begin your deliberations."

Citing *Pruett v. State*, 408 So.2d 202 (Ala.Crim.App. 1981), and *Dalrymple v. State*, 405 So.2d 725 (Ala.Crim. App.), cert. denied, 405 So.2d 728 (Ala. 1981), for the proposition that a reversal is required when the record shows the given charges did not go to the jury room, the defendant claims that the record is "completely devoid of any evidence or indication that the jury took with them Defendant's requested jury charges."

In *Pruett*, the court told the jury to take the "verdict forms" with them and denied a request by the defendant to send the given charges to the jury room. In *Dalrymple*, the "exhibits" were the sole items on record as having accompanied the jury as they left for their deliberations, and we observed that "(i) t is undisputed that these charges were not with the jury during their deliberations." 405 So.

[1]This case was tried before July 16, 1982, the effective date of Temporary Rule 14, Alabama Rules of Criminal Procedure, which superseded this provision of Section 12-16-13.

2d at 726. In both *Pruett* and *Dalrymple,* it was undisputed that the jury did not have the given charges in the jury room.

In contrast, the following exchange occurred during the hearing on defendant's motion for a new trial:

> "MR. KOMINOS (Defense Counsel): Judge, during the course of the trial the defendant submitted certain written jury charges to the Court, with a front cover, which I'll ask the court reporter to mark as an exhibit.
> "(Whereupon Defendant's Exhibit No. 1 was marked for identification by the reporter.)
>
> "MR. KOMINOS: Along with certain written requested charges. And those charges were not submitted to the jury to take back with them to the jury room during their deliberation. And on the authority of section 12-16-13 of the Alabama Code, we feel that it is error and move for a new trial.
>
> "THE COURT: Why do you say they didn't go back to the jury room?
>
> "MR. KOMINOS: Judge, I was here and I saw all the exhibits going back there, and everything — the exhibits went back there but the jury charges did not go back to the jury room. And I represent that as an officer of this court.
>
> "THE COURT: Well, of course — anything the State wants to say in reply?"
>
> . . . .
>
> "MR. SULLIVAN (Assistant District Attorney): Judge, I was also here and everything I remember is that the jury charges were put in a white envelope and taken back in the back. And I believe the burden is on the defendant in this matter to meet that burden to show that the charges were not taken back there. And I don't believe he's met that burden at all.
>
> "THE COURT: Anything else either one of you want to say?

"MR. KOMINOS: No, sir.

"MR. SULLIVAN: No, sir.

"THE COURT: Well, I want you to know that these charges did go back to the jury room. I don't know of any case where the given charges did not go back. And of course you say you're an officer of the court and if you saw that and if you knew it and felt that that was true, I'm sort of curious why you didn't feel you had some responsibility to raise the question at the time you saw it. . . ."

As the foregoing excerpt demonstrates, this case is distinguishable from *Pruett* and *Dalrymple* because the assistant district attorney stated that the charges *had* been sent along with the jury and the trial judge concurred in that finding. Moreover, defense counsel's contention that he realized the omission but did nothing to bring it to the court's attention, prevents him from gaining the relief he now seeks. As this court stated in *Hill v. State*, 57 Ala.App. 437, 329 So.2d 126, cert. denied, 295 Ala. 406, 329 So.2d 132 (1976):

> "With knowledge at the time of trial of the facts forming a basis for an objection . . . it constitutes a specie of estoppel for one to forego an objection and proceed with the trial in the hope . . . of a verdict in his favor." 57 Ala.App. at 440, 329 So.2d at 128.

The judgment of the trial court is due to be affirmed.

ORIGINAL OPINION WITHDRAWN;

APPLICATION FOR REHEARING GRANTED;
JUDGMENT AFFIRMED.

All Judges Concur.

Office of
Clerk of the Supreme Court
State of Alabama
Montgomery, Alabama 36101

Re: 82-1025

Ex Parte: Martha Franklin Schultz

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS.

(Re: Martha Franklin Schultz v. State of Alabama).

Petition for Writ of Certiorari denied. No opinion. JONES, J.--TORBERT, C.J., MADDOX, SHORES AND BEATTY, JJ., CONCUR.